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IN THE

Supreme Court of the United States

G. STEVEN ROWE, In His Official Capacity as Attorney General of the State of Maine,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR *AMICUS CURIAE* TOBACCO CONTROL LEGAL CONSORTIUM, CAMPAIGN FOR TOBACCO-FREE KIDS, AMERICAN LUNG ASSOCIATION, AMERICAN LUNG ASSOCIATION OF MAINE, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LEGACY FOUNDATION, AMERICANS FOR NONSMOKERS' RIGHTS, AMERICAN MEDICAL ASSOCIATION, AND MAINE MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER, STATE OF MAINE

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INTEREST OF *AMICUS CURIAE* [1]

Ten entities with significant interest in and expertise on legal issues surrounding tobacco control in the United States

[1] Counsel to the parties took no part in preparing this brief. No person or entity except listed *amicus curiae* contributed financially to the production of this brief. All parties consented in writing to the submission of this brief.

have joined to submit this brief: the Tobacco Control Legal Consortium, the Campaign for Tobacco-Free Kids, the American Lung Association, the American Lung Association of Maine, the American Cancer Society, the American Heart Association, the American Legacy Foundation, Americans for Nonsmokers' Rights, the American Medical Association and the Maine Medical Association. A full description of each *amicus* and its interest in this case is presented at the end of this brief.

ARGUMENT

In *New Hampshire Motor Transport Association v. Rowe*,[2] the First Circuit over-broadly interprets the Federal Aviation Administration Authorization Act of 1994[3] ("FAAAA") as preempting certain provisions of the State of Maine's tobacco delivery legislation and leaves Maine and other states unable to comprehensively reduce the availability of tobacco products to minors. Faced with growing youth access to the Internet, the increasing purchasing power of teens, and a proliferation of online tobacco retailers, states have the obligation and power to effectively regulate online tobacco retailers. Imposing requirements on the marking and delivery of packages containing tobacco products is an integral component of such regulation. Because the economic-centric FAAAA should not be read so broadly as to sharply curtail the states' public health authority properly exercised, this Court should reverse the First Circuit and revive Maine's power to effectively police youth access to tobacco on the Internet.

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[2] 448 F.3d 66 (1st Cir. 2006).

[3] Pub. L. No. 103-305, § 601, 108 Stat. 1569, 1605 (1994).

I. TOBACCO USE IN THE UNITED STATES PRESENTS A SERIOUS NATIONAL PUBLIC HEALTH CRISIS

Youth smoking remains a grave national concern. States have an obligation to prevent minors from obtaining tobacco products. That responsibility can be fulfilled under the states' plenary public health power to pass reasonable laws to reduce youth access to tobacco. Acting within this broad public health power and to fulfill its obligation, in 2003, Maine passed legislation regulating retailers who sell tobacco via the Internet and mail or phone order venues.[4] The ultimate goal of the legislation is to reduce youth access to cigarettes and thereby reduce youth smoking prevalence.

Tobacco use continues to be the leading preventable cause of death in the United States, accounting for an estimated 440,000 deaths each year.[5] In addition, for every one person who dies as a result of a smoking-related disease, twenty more people suffer from at least one serious illness due to smoking.[6] In an ongoing effort to investigate the health effects of smoking, the U.S. Surgeon General has repeatedly concluded that smoking causes a substantial number of diseases and other adverse health effects.[7] The list of cancers, cardiovascular and respiratory diseases, reproductive effects, and other health conditions associated with smoking, as

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[4] L.D. 1236 (121st Maine Leg.) (codified at ME. REV. STAT. ANN. tit. 22 §§ 1551, 1555-C, & 1555-D (West 2004)).

[5] U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL 9 (2004) [hereinafter HEALTH CONSEQUENCES].

[6] U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, CIGARETTE SMOKING – ATTRIBUTABLE MORBIDITY – UNITED STATES, 2000 MORBIDITY AND MORTALITY WEEKLY REPORT (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5235a4.htm.

[7] HEALTH CONSEQUENCES, *supra* note 5, at 1 (executive summary).

identified by the Surgeon General over the past 43 years, is far too long to enumerate here.[8] Further, the Surgeon General has concluded that smoking harms nearly every bodily organ and generally diminishes the overall health of smokers.[9]

The national public health crisis resulting from tobacco use is perpetuated by the tobacco industry's success in addicting America's children. A majority of tobacco users initiate use before age eighteen.[10] An estimated 4,000 kids try their first cigarette each day, and about 416,000 minors enter the ranks of daily smokers every year.[11] The Centers for Disease Control and Prevention (CDC) reports that about thirteen percent of middle school students and twenty-eight percent of high school students are current tobacco users.[12] Cigarette smoking is by far the most common form of tobacco use exhibited

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[8] *Id.* at 2-6 tbl.1.1. Most recently, the Surgeon General expanded that list to include the following newly discovered smoking-attributable diseases: abdominal aortic aneurysms, acute myeloid leukemia, cataracts, cervical cancer, kidney cancer, pancreatic cancer, pneumonia, periodontitis, and stomach cancer. *Id.* at 1.

[9] *Id.* at 8.

[10] U.S. DEP'T OF HEALTH & HUMAN SERVICES, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994) (executive summary) [hereinafter PREVENTING TOBACCO USE AMONG YOUNG PEOPLE].

[11] Campaign for Tobacco-Free Kids, *Smoking and Kids Factsheet* (2007), *available at* http://tobaccofreekids.org/research/factsheets/pdf/0001.pdf.

[12] U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, YOUTH TOBACCO SURVEILLANCE – UNITED STATES, 2001- 2002 (May 19, 2006), *available at* http://www.cdc.gov/mmwr/preview/ mmwrhtml/ss5503a1. htm [hereinafter YOUTH TOBACCO SURVEILLANCE]. Percentages are based on data collected from 2001 to 2002.

by this vulnerable population.[13] While cigarette smoking among high school students decreased from the late 1990s to 2003, its pervasiveness from 2003 to 2005 remained unchanged.[14]

Smoking at an early age means more exposure to the harmful effects of tobacco and more harm to the smoker. Of all children under eighteen years old living today, an estimated 6.4 million will die prematurely as adults because they began to smoke during adolescence.[15] Accepting the conclusions of the Surgeon General and scores of medical and public health professionals, this Court has recognized that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States."[16]

The CDC has urged states to develop and maintain comprehensive tobacco control programs to reduce tobacco use among youth and routinely evaluates and rates states' programs and recommends improvements.[17] Congress, pursuant to its spending power, has conditioned federal funding of state block grants for substance abuse prevention and treatment on states' enactment and enforcement of youth tobacco

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[13] *Id.* The Centers for Disease Control and Prevention report that 9.8 percent of middle school students and 22.5 percent of high school students currently smoke cigarettes. *Id.*

[14] U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, CIGARETTE USE AMONG HIGH SCHOOL STUDENTS—UNITED STATES, 1991-2005 (July 7, 2006), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5526a2.htm.

[15] U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, SUSTAINING STATE PROGRAMS FOR TOBACCO CONTROL DATA HIGHLIGHTS 2004 (2004), *available at* http://www.cdc.gov/tobacco/datahighlights/index.htm.

[16] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

[17] YOUTH TOBACCO SURVEILLANCE, *supra* note 12.

laws.[18] In an attempt to ameliorate the public health crisis caused by smoking and in response to the federal government's instigation, states have taken necessary steps to prevent children and teens from easily obtaining tobacco products from brick-and-mortar retailers like local convenience stores or readily available vending machines.[19] However, states now face a new, more insidious challenge: youngsters easily and increasingly accessing tobacco products from Internet-based retailers.

II. AS YOUTH USE OF THE INTERNET INCREASES AND THE NUMBER OF ONLINE TOBACCO RETAILERS MULTIPLIES, THE STATES' ABILITY TO PREVENT YOUTH ACCESS TO TOBACCO DIMINISHES

Internet use among children and adolescents is widespread and begins at an early age.[20] As a result, children and adolescents today have been referred to as the "Net Generation."[21] Once children reach grades five and six, their level of understanding of the complexity of the Internet matches that of adults.[22] A vast majority of teenagers in the United States—

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[18] Synar Amendment, 106 Stat. 394, P.L. 102-394, July 10, 1992, Sec. 1926, 42 U.S.C. § 300x-26(b)(1) (2000). U.S. Department of Health and Human Services promulgated final regulations in 1996 implementing the Synar Amendment. *See* 45 C.F.R. Part 96.

[19] *See, e.g.*, ME. REV. STAT. ANN. tit. 22 §§ 1555-B(1) (retail sales), § 1555-B(2) (sales to minors prohibited), § 1553-A (vending machines) (West 2004). Maine has had great success in this regard.

[20] U.S. DEP'T OF EDUCATION, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, COMPUTER AND INTERNET USE BY CHILDREN AND ADOLESCENTS IN 2001: STATISTICAL ANALYSIS REPORT 37 (2003).

[21] DON TAPSCOTT, GROWING UP DIGITAL: THE RISE OF THE NET GENERATION 15 (1998).

[22] Zheng Yan, *What Influences Children's and Adolescents' Understanding of the Complexity of the Internet*, 42 Developmental Psychol. 418, 426 (2006).

almost ninety percent of those aged twelve to seventeen—use the Internet, an increase of four million teens since 2000.[23] More than half of these youth say they log on at least once every day and almost one-quarter access the Internet several times daily.[24] Teens' use of the Internet exceeds that of adults by over twenty percent.[25]

Unmonitored access to the Internet is readily available to children and teens. Teenagers can log onto the Internet from home, school, a friend's house, a library, or other locations such as a community center or house of worship.[26] While many parents try to monitor and restrict their children's Internet use by using "filters"—software designed to block

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[23] Amanda Lenhart et al., *Teens and Technology: Youth Are Leading the Transition to a Fully Wired and Mobile Nation*, Pew Internet & American Life Project, at i (2005). *See also* U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, NAT'L TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET (Feb. 2002) 1 (executive summary), *available at* http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf; Health Policy Guide, Center for Health Improvement, *Penalties for Illegal Sales to Minors*, *available at* www.healthpolicyguide.org/do.asp?id=3148 ("U.S. Census data show that households with children younger than age 18 are more likely to have Internet access than households without children (62% versus 53%), and that 90% of children between the ages of 5 and 17 used computers in 2001." (citations omitted)).

[24] Lenhart, *supra* note 23, at 4. Fifty-one percent of youth log on daily, up from forty-two percent in 2000. *Id.*

Another study, which sampled 261 seventh and tenth graders from suburban California public schools, found that 91percent of participants used the Internet at home on an occasional or regular basis. Elisheva F. Gross, *Adolescent Internet Use: What We Expect, What Teens Report*, 25 Applied Developmental Psychol. 633, 640 (2004). Between forty and sixty percent of participants reported going online on a random single day within the period of the study. *Id.*

[25] Lenhart, *supra* note 23, at i.

[26] *Id.* at 5.

access to sites parents do not want their children to visit—this software often fails to restrict minors' access to online tobacco retailers' websites.[27]

Not only has youth Internet use grown exponentially, but "the scope of teens' online lives has also broadened" and "intensified,"[28] including making online purchases.[29] Over forty percent of online teens, or nine million youth, have made an Internet purchase.[30] The number of teen online shoppers has grown a strikingly significant seventy-one percent since 2000.[31] Today, "[b]ecoming an online consumer is a rite of passage that many Americans now experience during their teenage years."[32] Hence, "[m]arketing and selling [tobacco products] to minors is almost a logical consequence of Web-based retailing."[33]

As the number of youths logging on to the Internet steadily rises, so too does the number of Internet retailers selling

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[27] *Id.* at 7-8. *Compare* www.cigarettesexpress.com (stating site is registered with parental control software, including CyberSitter™, Net Nanny®, Cyber Patrol®, and Surf Watch) *with* John H. Knowles, Jr. et al., *Internet Sales of Tobacco: Heading Off the New E-pidemic*, 25 J. OF PUB. HEALTH POL'Y, 58, 64 (2004) ("It is hardly a challenge for computer savvy teenagers to find a cyber-café or a friend with unrestricted access to the [I]nternet. One tobacco retailing site, www.peacefire.org, even encourages users to go to their instructions on 'How to disable your blocking software,' by proclaiming, 'It's not a crime to be smarter than your parents.'").

[28] Lenhart, *supra* note 23, at i. Youths tend to get involved in online activities that are unavailable in their local communities. Mechthild Maczewski, *Exploring Identities Through the Internet: Youth Experiences Online*, 31 CHILD & YOUTH CARE F., 111, 117 (2002).

[29] Lenhart, *supra* note 23, at i.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 36.

[33] Knowles, *supra* note 27, at 60.

tobacco products.[34] From February to November 2000 alone, the number of websites selling cigarettes increased by seventy percent.[35] Due to the evanescent nature of these ventures, it is virtually impossible to enforce youth access laws at the point of purchase.

Given the enormity of the public health crisis created by tobacco use, legislators and public health scholars agree that limiting youth access to tobacco is critical, since tobacco addiction most often begins during childhood or adolescence.[36] However, to be effective tobacco control must be comprehensive.[37] As access to tobacco products from brick-

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[34] *See, e.g.*, Kurt M. Ribisl et al., *Web Sites Selling Cigarettes: How Many Are There in the USA and What Are Their Sales Practices?*, 10 TOBACCO CONTROL 352, 355 (2001) (exploring keyword search results from various popular internet search engines to estimate the number of online cigarette vendors).

[35] A. Bryant et al., *Online Sales: Profit Without Question*, 11 TOBACCO CONTROL 226, 226 (2002). These websites are easily accessed in a matter of seconds. For example, a Google™ search using the phrase "buy cigarettes" yielded hundreds of "hits" for online cigarette vendors' websites, in only .15 second. The search, which was done on a personal computer without filtering software, yielded 2,250,000 results of various websites containing the exact phrase "buy cigarettes." Nineteen of the first twenty results included the following online retailers: www.discountcheapcigarettes.com; www.telesmokes.com; www.1001cigarettes.com; www.oklahomaoutlet.com; www.cigarettesexpress.com; www.cigarettes-online.biz; www.smoker-heaven.com; www.bigchiefcigarettes.com; www.cheap-cigarettes-shop.net; www.smokesonsale.com; www.cigline.net; www.totalsmokes.com; www.buycheapcigarettes.com; www.onlinecheapcigarettes.com; www.dirtcheapcigarettes.com.

[36] PREVENTING TOBACCO USE AMONG YOUNG PEOPLE, *supra* note 10.

[37] *See* U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, PROMISING PRACTICES IN CHRONIC DISEASE PREVENTION AND CONTROL: A PUBLIC HEALTH FRAMEWORK FOR ACTION 8-2 (2003) ("[T]he comprehensive approach . . . has been the most successful in reducing tobacco use, and . . . statewide comprehensive approaches [are] particularly effective."); U.S. DEP'T OF HEALTH & HUMAN SERVICES, REDUCING TOBACCO USE: A REPORT OF THE SURGEON

and-mortar retailers becomes more difficult due to effective enforcement, adolescents will increasingly turn to Internet vendors to purchase tobacco. Studies confirm that the nature of the Internet, so immensely broad in scope and dynamic in nature,[38] allows minors to purchase cheaper, untaxed tobacco products with relative ease.[39] As cyberspace acts as a risk-free zone where minors can anonymously purchase tobacco,[40] unrestricted online tobacco sales create a major barrier to comprehensive youth tobacco control. "Left unchecked, rising Internet cigarette sales have the potential to undermine decades of progress in reducing youth and adult smoking rates achieved by raising prices."[41]

GENERAL 11 (2000) ("A comprehensive approach . . . has emerged as the guiding principle for future efforts to reduce tobacco use.").

[38] Joanna E. Cohen et al., *Tobacco Commerce on the Internet: A Threat to Comprehensive Tobacco Control*, 10 TOBACCO CONTROL 364, 366 (2001).

[39] Bryant, *supra* note 35, at 226. *See also* U.S. General Accounting Office, Report to Congressional Requestors, *Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement* (August 2002)(describing the difficulties of enforcing tax laws on Internet cigarette vendors and the evanescent nature of such vendors), *available at* www.gao.gov/new.items/d20743.pdf.

[40] Christopher Banthin et al., *Legal Approaches to Regulating Internet Tobacco Sales*, 32 J. OF LAW, MED. & ETHICS 64, 64 (2004).

[41] Kurt M. Ribisl et al., Internet Cigarette Sales, Briefing to the Congressional Task Force on Tobacco and Health, July 17, 2006, Washington, DC, *available at* http://www.sph.unc.edu/images/stories/news/Ribisl_InternetCigaretteSales.pdf . *See also* Knowles et al., *supra* note 27, at 59 (pointing out that "[I]nternet sales have the potential to erode the gains made by tobacco control") (citations omitted).

While the potential for youth online tobacco sales is present, and controlled studies demonstrate the ease with which youth can make such purchases (*see infra* notes 42-47 and accompanying text), scant data is available on the actual level of youth online tobacco purchases. *See* Campaign for Tobacco-Free Kids, *Where Do Youth Smokers Get Their Cigarettes* (2007), *available at* http://tobaccofreekids.org/research/fact

The Internet serves as a virtually effortless conduit to underage smokers' access to tobacco products largely because online tobacco vendors do not adequately prevent tobacco sales to minors.[42] A central obstacle to online youth tobacco control is vendors' nominal—if any—efforts at verifying a customer's age.[43] A 2003 study reported that online cigarette vendors sold cigarettes to minors in about 92 percent of

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sheets/pdf/0073.pdf ("The 2003 National Survey on Drug Use and Health (NSDUH) found that among 12 to 17 year olds who had smoked in the last month, more than three out of five (77%) had purchased their own cigarettes. . . . and a small portion purchased cigarettes over the Internet or through the mail (2.6% and 2.9%, respectively). . . . While there have been more recent NSDUH surveys, *no questions on youth access have been asked since 2003*." *Id.* (emphasis added).

Even if current rates are low nationally, a state with an effective enforcement program at brick-and-mortar stores may push kids to the Internet for tobacco purchases. The irony of the impact of the First Circuit's striking down of the Maine law is that Maine is left with little ability to effectively stop youth online sales, sales that are likely to increase due to the State's successful efforts at brick-and-mortar stores.

[42] *See, e.g.*, Bryant, *supra* note 35, at 226-27; *see also* Knowles, *supra* note 27, at 59 ("Unger, Rohrbach and Ribisl (9) reported that only 8 % of vendors required submission of a photo ID for proof of legal age, with most sites asking only that customers 'certify' they are over 18 years of age."). *Compare* websites listed *supra* note 35: Of those nine-teen sites, only three had meaningful age verification and purchaser identification procedures in place. Other sites, while posting that the purchaser must be at least 18 (21 in some cases), did not require any proof, but put the onus on the purchaser with language such as: "By placing an order at Cigline, you attest that you are at least 21 years of age and legally able to purchase and possess online cigarettes in your own state and community." *See* www.cigline.net.

[43] Banthin, *supra* note 40, at 64. *See also* Kurt M. Ribisl et al., *Are the Sales Practices of Internet Cigarette Vendors Good Enough to Prevent Sales to Minors?*, 92 AM. J. PUB. HEALTH 940, 940 (June 2002) ("Most Internet cigarette vendors use inadequate procedures for age verification. Youths who misrepresent their age and obtain a money order could potentially purchase cigarettes on-line without difficulty.").

attempted purchases.[44] In each successful purchase, the consumer's age was never verified upon delivery;[45] rather, most packages were left at the door.[46] In another study, over 70 percent of online tobacco retailers who received money orders from minors sent cigarettes to the underaged customers without any age verification.[47]

No simple solution exists to resolve the unique challenges presented by online tobacco commerce.[48] Public health and tobacco control scholars suggest that proactive solutions be made to address online threats to comprehensive control. Recognizing the Internet "gap" in youth access enforcement and desiring to close that easy avenue to cigarette purchases, Maine enacted legislation regulating the delivery of tobacco via the Internet. This law is a critical component of Maine's comprehensive plan to curtail youth access to tobacco products, and thereby reduce youth smoking prevalence.

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[44] Kurt M. Ribisl et al., *Brief Report: Internet Sales of Cigarettes to Minors*, 290 J. AM. MED. 1356, 1357 (2003).

[45] *Id.* at 1358. In a 2004 study, 82 of 89 young participants reported that they pretended to be older while online, and some said they did so "to evade online age restrictions." Gross, *supra* note 24, at 643.

[46] Ribisl, *supra* note 44, at 1359.

[47] Bryant, *supra* note 35, at 227.

[48] Although state enforcement actions against individual websites or vendors have been used in some instances, such actions have a narrow and fleeting impact. The website operator can easily establish a new web address and begin selling cigarettes from that site almost immediately after a state has taken action. State enforcement actions also have modest impact because the Internet tobacco sellers are often based overseas, presenting serious hurdles to service of process and jurisdiction. Hence, a state desiring to have a comprehensive and effective impact on Internet tobacco sales must focus, as Maine has, on the delivery process. *See generally* GAO Report, *supra* note 39.

III. THE FIRST CIRCUIT'S DECISION UNREASONABLY PREVENTS MAINE AND OTHER STATES FROM COMPREHENSIVELY CONTROLLING YOUTH ACCESS TO TOBACCO

The First Circuit improperly ruled that the FAAAA preempts provisions of the Maine tobacco delivery law requiring retailers to use carriers that monitor the point of delivery and imputing knowledge to those carriers that deliver contraband tobacco despite identifiable markings. The decision severely limits Maine's ability to regulate Internet or mail-order tobacco sales as part of the State's comprehensive plan to reduce youth smoking. This Court should reverse the First Circuit, reinstating state police power as it is traditionally exercised in this area.

A. Maine's Tobacco Delivery Law Was Properly Enacted Pursuant to the State's Police Powers and is a Necessary Response to Congress's Call to Reduce Youth Access to Tobacco

The states' authority to enact and enforce laws designed to prevent minors' access to tobacco products sold via the Internet is as broad as the power to prevent such sales at brick-and-mortar stores. The states' obligation to regulate Internet tobacco sales is no less than the obligation to regulate brick-and-mortar sales. Traditional police powers include such regulation and federal law suggests such an obligation. The First Circuit's decision virtually obliterates the states' police power in this area as it relates to Internet sales and clashes with important federal public health laws that impose on states the obligation to prevent youth access to tobacco.

Congress has directly recognized and encouraged the states' role in enforcing youth access tobacco laws. Pursuant to the 1992 Synar Amendment, Congress directly mandates state regulation of youth access to tobacco by conditioning federal funding on state enactment and enforcement of laws banning

the sale of tobacco to minors.[49] Congress has not yet taken action to restrict Internet tobacco sales, but has, so far, left that to the states. [50]

The judiciary has also acknowledged that states play a role in preventing youth access to tobacco. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001), this Court recognized "established congressional policy that supports" a state role in the regulation of tobacco sales. Similarly, the Fourth Circuit emphasized the "clear congressional intent that States exercise their traditional police powers and take a primary role in attacking the problem of youth access to tobacco products." *Brown & Williamson Tobacco Corp. v. Food and Drug Admin.*, 153 F.3d 155, 175 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000).

Pursuant to its police powers and to help it comply with the Synar Amendment, Maine properly enacted a public health law "to Regulate the Sale of Tobacco Products and to Prevent the Sale of Cigarettes to Minors."[51] Maine's tobacco delivery

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[49] 42 U.S.C. § 300x-26(b)(1) (2000) ("Synar Amendment") (States will enforce their tobacco laws "in a manner that can be reasonably expected to reduce the extent to which tobacco products are available to individuals under the age of 18.") The Synar Amendment was originally enacted in 1992 as Section 1926 of Title XIX of the Federal Public Health Service Act. *See also* Joseph R. DiFranza and G.F. Dussault, *The Federal Initiative to Halt the Sale of Tobacco to Children—the Synar Amendment, 1992-2000: Lessons Learned*, 14 TOBACCO CONTROL 93, 97 (2005) (noting that Maine is one of the few states that has endeavored to promote maximum public health benefits by successful enforcement of laws banning the sale of tobacco to minors).

[50] *See, e.g.*, H.R. 2824 (2004), the "Internet Tobacco Sales Enforcement Act" and S. 1177 (2004), the "Prevent All Cigarette Trafficking Act" (PACT), both of which were failed attempts at federal legislation regulating Internet sales and sellers of tobacco.

[51] L.D. 1236 (121st Maine Leg.) (codified at ME. REV. STAT. ANN. tit. 22 §§ 1551, 1555-C, & 1555-D (West 2004)).

law does so by imposing, among other things, [52] three requirements. First, the law compels licensed retailers to choose a delivery service or carrier that provides age and identity verification and signature services at the point of delivery
to consumers in Maine.[53] Second, the Act mandates that tobacco retailers "clearly mark the outside of the packages of tobacco products to be shipped to indicate that the contents are tobacco products and to show the name and State of Maine tobacco license number of the tobacco retailer."[54] Third, the law imposes penalties on any person who "knowingly transport[s] . . . a tobacco product purchased from a person who is not licensed [in Maine] as a tobacco retailer."[55] A carrier is "deemed to know" that a given package contains a tobacco product if the package contains markings in accordance with § 1555-C(3)(b) or if the package was received

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[52] Maine's law also consists of several additional provisions designed to comprehensively curtail youth tobacco access. For one, all retailers must be licensed and are subject to several restrictions on the acceptance of an order for delivery within the State of Maine. ME. REV. STAT. ANN. tit. 22 §§ 1555-C(1)-(2); *see also id.* at § 1555-C(2)(B) (requiring retailers to receive payment by credit card or check for sales linked to online advertisements). Retailers must also report sales to the Maine Bureau of Revenue Services. *Id.* at § 1555-C(4). Further, Maine's legislation prohibits the use of another person's name in ordering tobacco products. *Id.* § 1555-C(5).

[53] ME. REV. STAT. ANN. tit. 22 §§ 1555-C(3)(C)(1)-(3). The statute requires the package addressee to be the purchaser, who must be over age eighteen and personally sign for the package upon delivery. A valid photo ID is required for any purchaser appearing to be under age twenty-seven.

[54] *Id.* at § 1555-C(3)(B). This provision is not a contested issue in the case at hand, but bears on the imputed knowledge provision in § 1555-D.

[55] *Id.* at § 1555-D.

from a known unlicensed retailer as identified by the Attorney General.[56]

At least ten other states have passed similar legislation aimed at preventing youth access to tobacco online.[57] Like the Maine law, tobacco control delivery laws in other jurisdictions require retailers to use a carrier with age and signature verification upon delivery of tobacco products. For example, the State of Virginia requires retailers to use a delivery service that provides signature acceptance of delivery and proof of age through "a valid, government-issued identification" at delivery time.[58] Similarly, the State of Utah allows mail-order tobacco sales if the retailer requires a "postal authority or other common carrier to," among other things, obtain a signature and verify the age of the person taking the delivery.[59] Many other states regulate youth access to tobacco via Internet delivery sales either by banning such

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[56] *Id.* Maine's Office of the Attorney General maintains lists of licensed retailers and known unlicensed retailers, which are made available to carriers. *Id.* § 1555-D-1. *See also* New Hampshire Motor Transport Ass'n v. Rowe, 377 F. Supp. 197, 211 & n.60 (D. Me. 2005).

[57] *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-3225(A)(2) (West 2004); DEL. CODE. ANN. tit. 30, § 5365(a)(2) (West 2004); IND. CODE ANN. § 24-3-5-5(a) (West 2004); LA. REV. STAT. ANN. § 47:874(A)(2) (West 2004); OKLA. STAT. ANN. tit. 68, § 317.4(A)(2) (West 2004); OR. REV. STAT. ANN. § 323.718(1)(b) (West 2004); TEX. HEALTH & SAFETY CODE ANN. § 161.455(a)(2) (Vernon 2004); UTAH CODE ANN. § 76-10-105.1(3)(a) (West 2004); VA. CODE ANN. § 18.2-246.10(2) (West 2004); W. VA. CODE ANN. § 16-9E-4(a)(2) (West 2004).

[58] VA. CODE ANN. § 18.2-246.10(2) (West 2004).

[59] UTAH CODE ANN. § 76-10-105.1 (West 2004).

sales[60] or by regulating retailers or affecting carriers in some fashion.[61]

B. Maine's Tobacco Delivery Law Is Not Preempted By The FAAAA And Therefore The First Circuit's Exceedingly Broad Interpretation Of FAAAA Preemption Should Be Reversed

Enacted in 1994, the FAAAA prohibits states from regulating the prices, routes, or services of air or motor carriers that transport property.[62] The FAAAA is not a tobacco control measure and was not intended to limit states' powers to police minors' access to tobacco. Rather, the FAAAA is specifically intended to prevent states from engaging in economic regulation that would eliminate non-uniform air and motor carrier operations.[63]

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[60] *See, e.g.*, N.Y. PUB. HEALTH LAW § 1399-ll (McKinney 2004); MD. CODE ANN., BUS. REG. § 16-223 (2004).

[61] *See, e.g.*, ALASKA STAT. § 43.50.105 (Michie 2004); CAL. BUS. & PROF. CODE § 22963 (West 2004); CONN. GEN. STAT. ANN. § 12-285c (West 2004); IDAHO CODE ANN. §§ 39-5701 to -5718; 720 ILL. COMP. STAT. ANN. §§ 678/5, -/10, -/99 (West 2004); KAN. STAT. ANN. § 79-3333 (2004); MICH. COMP. LAWS ANN. § 205.431 (West 2004); MO. ANN. STAT. §§ 407.925 to .932 (West 2004); NEV. REV. STAT. ANN. § 202.24935 (West 2004); R.I. GEN. LAWS §§ 11-9-13.11 to -13.19 (2004); TENN. CODE ANN. § 39-17-1504(d) (West 2004); WASH. REV. CODE ANN. §§ 70.155.010, -.105, -.110 (West 2004).

[62] 49 U.S.C. § 14501(c)(1) (2000) ("[A] State . . . may not enact or enforce a law . . . related to a price, route, service of any motor carrier . . . with respect to the transportation of property."); 49 U.S.C. § 41713(b)(4)(A) (2000) ("[A] State may not enact or enforce a law . . . related to a price, route or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle. . . .").

[63] H.R. Conf. Rep. No. 103-677, at 85-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1758-60.

Maine's tobacco delivery law is a public health measure aimed at regulating online tobacco retailers and preventing the illegal delivery of tobacco products to minors by anyone—including carriers. As such, the tobacco delivery law does not significantly affect carrier services in any way sufficient to trigger FAAAA preemption. The FAAAA trumps only state laws that impose on carriers economic regulations such as rate and tariff measures; contrary to the First Circuit's conclusion, the FAAAA was not intended to reach essential public health laws that are clearly within the province of a state's police powers.

The First Circuit acknowledged that the legislative history of the FAAAA reveals Congress's intent to preempt only state economic regulation,[64] and further noted the limited preemptive interpretation this Court applied in its only case involving the FAAAA.[65] Nevertheless, the First Circuit sidelined all evidence of Congress's preemptive intent, emphasizing instead that "legislative history cannot trump the statute's [plain] text."[66] Relying on other federal legislation and case

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[64] The First Circuit noted that "there is some support in the legislative history . . . that the FAAAA preempts only state economic regulation" and cited to support in the Conference Committee Report for the Act. New Hampshire Motor Transport Ass'n v. Rowe, 448 F.3d 66, 77 (1st Cir. 2006).

[65] *See Rowe*, 448 F.3d at 77 (citing Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 440 (2002)).

[66] *Rowe*, 448 F.3d at 77. The First Circuit noted that "[i]n every preemption case, 'the purpose of Congress is the ultimate touchstone.'" *Id.* at 74 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). The First Circuit further remarked that "[t]he primary focus is on the 'plain wording' of the statute because the text 'contains the best evidence of Congress' pre-emptive intent.' " *Rowe*, 448 F.3d at 74 (citing Sprietsma v. Mercury Marine, 537 U.S. 51, 62 (2002)). The court acknowledged the relevance of " 'the structure and purpose of the statute as a whole as revealed . . . through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory

law, the First Circuit interpreted the FAAAA as "deliberately expansive" and broadly preemptive in purpose,[67] holding that

> the FAAAA was not intended to preempt only a narrow class of economic regulations while excluding the many laws enacted by the states under their police powers. If Congress had such a limited purpose in mind, it likely would have employed narrower language in fashioning the FAAAA preemption provisions.[68]

Furthermore, the First Circuit erroneously applied this Court's requirement that to find a state law is "related to" carrier services, the law must have a "connection or reference to" carrier services[69] or a "forbidden significant effect" on those services.[70] The First Circuit dismissively read "significant" out of the standard and substituted a "logical" effect.[71] This needlessly broadens the FAAAA's preemptive effect and ignores this Court's statement in *Morales* that there are instances of state regulation "relating to" prices, routes, or

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scheme to affect business, consumers and the law.'" *Rowe*, 448 F.3d at 74 (citing *Medtronic*, 518 U.S. at 486).

[67] *Rowe*, 448 F.3d at 75-78.

[68] *Id.* at 75.

[69] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

[70] *Id.* at 388 (finding that "it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares").

[71] "We agree with the district court that there is no such quantification requirement [to measure forbidden significant effect]. The cases in this area have looked to the *logical* effect that a particular scheme has on the delivery of services or the setting of rates and have not required the presentation of empirical evidence." *Rowe*, 448 F.3d at 82, n. 14 (emphasis added). The First Circuit further emasculated this Court's standard by stating that Maine's age verification procedures "all *could* affect timely deliveries." *Id.* at 79 (emphasis added).

services that would not be preempted.[72] This Court recognized the limits of preemption in *Morales*, stating that its ruling "does not give the airlines *carte blanche* to lie and deceive consumers . . . ." [73] Nor should any transporter of contraband tobacco products have *carte blanche* to disregard the contents of its cargo.

C. The Decision Below Prevents Maine From Regulating The Critical Point Of Delivery Of Tobacco To Minors, Thus Impairing Maine From Fulfilling The Goal Of The Synar Amendment To Reduce Minors' Access To Tobacco

The First Circuit's conclusion that Congress intended the FAAAA to preempt state public health laws like Maine's tobacco delivery provisions[74] is also incompatible with the goals set forth in the Synar Amendment.[75] The Synar Amendment requires that states enforce laws prohibiting youth tobacco sales. Although in 1992 such sales took place almost exclusively in brick-and-mortar stores and the enforcement mechanism focused on brick-and-mortar stores, nothing in the Synar Amendment limits the states' overall obligation to such sales. Yet the First Circuit's decision

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[72] "Nor need we address whether state regulation of the nonprice aspects of fare advertising (e.g. state laws preventing obscene depictions) would similarly 'relat[e] to' rates; the connection would obviously be far more tenuous." *Morales*, 504 U.S. at 390. While the case at hand involves carrier services rather than prices, the connection is at least equally as tenuous.

[73] *Id.* at 390-91.

[74] *See supra* note 67 and accompanying text; *see also Rowe*, 448 F.3d at 78 ("We therefore conclude that the FAAAA preempts state police-power enactments to the extent that they are 'related to' a carrier's prices, routes, or services.").

[75] *See supra* notes 18 and 49 and accompanying text.

substantially impairs the ability of the states to limit sales to those covered by sound, reasonable restrictions on the retail sale of tobacco products when the sale is consummated over the Internet and delivered by a common carrier. With no detail or explanation, the court blithely states that the Synar Amendment and a broad interpretation of the FAAAA's preemptive force "can exist harmoniously because states may pass laws to curb underage smoking without passing laws 'related to' carrier prices, routes, or services."[76] Because physical delivery is a crucial part of the illegal sale,[77] a regulation that does not impact the carriers will be far less effective. And the First Circuit's overbroad interpretation of the FAAAA preemption clause makes such regulation far more difficult.[78]

States must regulate the point of physical delivery of tobacco to effectively combat youth access to tobacco and

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[76] *Rowe*, 448 F.3d. at 78, n.12.

[77] *See* ME. REV. STAT. ANN. tit. 22 § 1555-B (West 2004) ("A person may not sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age."). *See also* Ribisl, *supra* note 43, at 940 (very few "Internet cigarette vendors stated that they required photographic age identification at the point of delivery, the prevailing standard at [brick-and-mortar] retail outlets").

[78] Although not emphasized by the First Circuit, states also desire to regulate Internet tobacco sales to prevent the tax evasion that such sales inherently create. Tax evasion not only costs a state financially, such evasion undercuts the public health impact of reduced consumption, especially by minors, that accompanies higher cigarette prices. The federal government has attempted to assist states in this effort through the Jenkins Act, 15 U.S.C. §§ 375-378, which requires tobacco sellers who ship cigarettes across state lines to report sales to the appropriate state tax authority. It is fair to say that the federal government has invested no resources in enforcement of the Jenkins Act. *See* GAO Report, *supra* note 39. As the GAO Report explains, state governments have been active in indirect enforcement of the Jenkins Act, at least attempting to have an impact on Internet and mail order tobacco sales, while the federal government has taken no action.

receive federal funding conditioned under the Synar Amendment. Congress did not intend an expansive preemption clause when adopting the FAAAA; the focus was and remains on economic impact on carriers. Indeed, the district court acknowledged that if Congress were to be presented with the issue today, it would not have intended FAAAA preemption of Maine's tobacco delivery law.[79] Nevertheless, that court and the First Circuit put on blinders, performed strict construction that denies logic, history, and this Court's previous decision on FAAAA preemption, and found Maine's tobacco delivery law preempted.

Any regulation of the point of delivery of tobacco is naturally going to have *some* effect on carriers who deliver the tobacco products. Under the First Circuit's exceedingly broad interpretation of "relating to" in the FAAAA,[80] every hypothetical regulation policing the point of delivery—including an outright ban on Internet sales—could have a "forbidden significant effect" on carrier services[81] and there-

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[79] The district court opined:

> Given the deadly health consequences, there are no persuasive arguments for allowing minors to have tobacco products. Thus, it is hard to believe that, if Congress were confronted now with the specific question whether Maine should be able to take steps to protect the health of its children, Congress would vote to prohibit what Maine is trying to do. But the federal legislation that I must interpret comes from a push to deregulate airlines and motor carriers generally, without regard for the topic or goal of the preempted state regulation . . . .

New Hampshire Motor Transport Ass'n v. Rowe, 377 F. Supp. 2d 197, 206 (D. Me. 2005).

[80] *See Rowe*, 448 F.3d at 75, 78-79 (noting that the FAAAA's use of the phrase "relating to" intended the statute to have a broad preemptive purpose).

[81] *Id.* at 78-79.

fore may be rendered unenforceable through federal preemption.

Maine's inability to regulate the point in time when tobacco sold online is placed in the hands of a minor undermines the State's attempt to achieve comprehensive youth tobacco control, and threatens to nullify the progress Maine has made to date.[82] Therefore, the First Circuit's overly broad interpretation of FAAAA preemption directly conflicts with Congress's goal that states take effective action to reduce youth access to tobacco.

In rejecting the Attorney General's argument that laws enacted pursuant to a state's police power to protect the health and welfare of its citizens are excepted from the FAAAA's preemptive force, the First Circuit reasoned that "an overly broad interpretation of the FAAAA exceptions 'would swallow the rule of preemption.'"[83] Instead, the First Circuit's overly broad interpretation of FAAAA's preemption derogates the Synar Amendment, through which Congress "inten[ded] that states take the lead in addressing the underage smoking problem."[84]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing technical assis-

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[82] Maine has been praised by the American Cancer Society, the American Lung Association and the Campaign for Tobacco-Free Kids for the State's effective use of tobacco control funds, particularly as related to youth access to tobacco and youth smoking. *See* Campaign for Tobacco-Free Kids, *Broken Promise to Our Children: The 1998 State Tobacco Settlement Seven Years Later* (2005), *available at* http://tobaccofreekids.org/reports/settlements/2006/fullreport.pdf.

[83] *Rowe*, 448 F.3d at 76 (citing United Parcel Serv., Inc. v. Flores-Galarza, 385 F.3d 9, 14 (1st Cir. 2004)).

[84] *Id.* at 78 n.12.

tance to public officials, health professionals, and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states and is supported by national advocacy organizations, voluntary health organizations, and others.[85] In addition, TCLC prepares legal briefs as *amicus curiae* in cases in which its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. TCLC has submitted *amicus* briefs in recent cases before the U.S. Supreme Court; the Supreme Courts of California, Delaware, Florida, Kentucky, Montana, and Washington; and the U.S. District Court for the District of Columbia.

Amicus Campaign for Tobacco-Free Kids, a nonprofit corporation based in Washington, D.C., works to educate the public and policymakers about effective public and private sector policies to prevent and reduce tobacco use and its harms, and to advocate for the adoption of such policies, with a special focus on preventing and reducing tobacco use among youth. The Campaign for Tobacco-Free Kids has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing tobacco use

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[85] TCLC's coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. Other affiliated legal centers include the Technical Assistance Legal Center (TALC) at the Public Health Institute of California, in Oakland, California; the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy (TRC) at the University of Maryland School of Law in Baltimore, Maryland; the Tobacco Control Resource Center (TCRC) at Northeastern University School of Law in Boston, Massachusetts; the Smoke-Free Environments Law Project (SFELP) at the Center for Social Gerontology in Ann Arbor, Michigan; the Tobacco Control Policy and Legal Resource Center at New Jersey GASP in Summit, New Jersey; and the Tobacco Public Policy Center at Capital University Law School in Columbus, Ohio.

and its harms, especially among children. Among other activities, the Campaign has done education and advocacy work relating to Internet and mail-order sales of tobacco products to kids articulating why such sales are harmful to state efforts to collect applicable taxes; keep tobacco prices at high rates to discourage smoking, especially in youth; and diminish the ready access to tobacco products for all consumers.

Amicus American Lung Association ("ALA") is one of the nation's oldest voluntary health organizations, with over 300,000 volunteers and affiliates in all fifty states, the District of Columbia and Puerto Rico. Since cigarette smoking is a major cause of chronic obstructive lung disease, ALA has long been active in research, education, and public policy advocacy on the adverse health effects of tobacco products. ALA has advocated for the regulation of tobacco products for more than two decades. *Amicus* American Lung Association of Maine[86] ("ALAME") is one of the state's oldest voluntary health organizations. From tuberculosis to smoking to unhealthy air, ALAME has fought the most significant threats to lung health for nearly 100 years. Since cigarette smoking remains the major cause of chronic obstructive lung disease, the ALAME has long been active in research, education and public policy efforts to prevent smoking, help those who want to quit and protect everyone from the health hazard of secondhand smoke. ALAME has advocated for tobacco product regulation for more than three decades.

Amicus American Cancer Society, Inc. ("ACS") has over three million volunteers nationwide, including 50,000 physicians. The organization's mission is to eliminate cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer, through research, educa-

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[86] Legally, the American Lung Association of Maine is part of the American Lung Association of New England, a non-profit corporation.

tion, advocacy, and service. The organization was founded in 1913, and since that time has conducted groundbreaking research in identifying the use of tobacco products as a major cause of cancer, and educating the public about its deadly effects. ACS strongly advocates for tobacco regulation at all levels of government, including trying to ensure that children do not have access to this lethal product.

Amicus American Heart Association ("AHA") is a non-profit, voluntary health organization with nearly 2,000 community organizations in the 50 states, the District of Columbia and Puerto Rico. AHA's mission is building healthier lives, free of cardiovascular diseases and stroke, including reducing tobacco use. AHA has long been active before Congress and regulatory agencies on tobacco and health-related matters and has petitioned the FDA on several occasions seeking regulation of cigarettes and other tobacco products under the Food, Drug, and Cosmetic Act.

Amicus American Legacy Foundation, created as a result of the 1998 Master Settlement Agreement between 46 states and the tobacco industry, is dedicated to building a world where young people reject tobacco and anyone can quit. The Foundation is a national leader in youth tobacco prevention with its proven-effective and award-winning truth® mass media campaign targeted to those twelve to seventeen year olds most likely to initiate smoking.

Amicus Americans for Nonsmokers' Rights ("ANR") is a national non-profit tobacco control advocacy organization based in Berkeley, California. Since its formation in 1976, ANR has been dedicated to protecting nonsmokers' rights to breathe smoke-free air in enclosed public places and workplaces and to preventing tobacco addiction among youth. ANR represents a national constituency of over 8,000 individuals and organizations concerned about the health risks that tobacco products pose to the health and safety of smokers

and nonsmokers alike and committed to reducing and preventing tobacco use.

Amicus American Medical Association ("AMA"), an Illinois non-profit corporation founded in 1847, is an association of approximately 240,000 physicians, residents, and medical students. Its members practice in every state and in all fields of medical specialization, and it is the largest medical society in the United States. Its objects are to promote the science and art of medicine and the betterment of public health. The AMA has developed expertise in the pharmacology of nicotine, the toxic effects of cigarette smoke, and the societal implications of tobacco usage. For many years, the AMA has been one of the leading anti-smoking organizations in the United States.

Amicus Maine Medical Association ("MMA") is a professional organization founded in 1853 that represents more than 2700 Maine physicians and whose purpose is "to unite and support the physicians of Maine in promoting the health of Maine's citizens, protecting and promoting the quality of medicine, and supporting the physicians' function as advocates for their patients." The MMA is active in representing the interests of Maine physicians and patients before the Maine legislature and Executive Branch agencies. Through its Public Health Committee and its role as a founding member of the Maine Coalition on Smoking or Health more than 25 years ago, the MMA has been involved in tobacco control advocacy in Maine for many years. The MMA has a particular interest in this litigation because of its advocacy role in the legislation that is subject to dispute in this matter.

CONCLUSION

For the foregoing reasons, this Court should reverse the First Circuit's decision, find Maine's law enforceable, and return to states the power to comprehensively curtail youth access to tobacco.

Respectfully submitted,

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